



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 208, 212, 213, 215, 216, 217, 234, and 237

[Docket DARS-2018-0055]

RIN 0750-AJ74

Defense Federal Acquisition Regulation Supplement: Restrictions on Use of Lowest Priced Technically Acceptable Source Selection Process (DFARS Case 2018-D010)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD proposes to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2017 and 2018 that establish limitations and prohibitions on the use of the lowest price technically source selection process.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018-D010, using any of the following methods:

- o *Federal eRulemaking Portal:* <http://www.regulations.gov>.

Search for "DFARS Case 2018-D010." under the heading "Enter keyword or ID" and selecting "Search." Select "Comment Now and" follow the instructions provided to submit a comment. Please include "DFARS Case 2018-D010" on your attached documents.

- o *Email:* *osd.dfars@mail.mil.* Include DFARS Case 2018-D010 in the subject line of the message.

- o *Fax:* 571-372-6093.

- o *Mail:* Defense Acquisition Regulations System, Attn: Ms. Carrie Moore, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 703-372-6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement the limitations and prohibitions on use of the lowest prices technical acceptable (LPTA) source selection process provided in sections 813, 814, and 892 of the National Defense Authorization Act (NDAA) for Fiscal

Year (FY) 2017 (Pub. L. 114-328) and sections 822, 832, 882, and 1002 of the NDAA for FY 2018 (Pub. L. 115-91). The following is a summary of the statutory restrictions:

- Section 813 of the NDAA for FY 2017, as amended by section 822 of the NDAA for FY 2018, establishes that the LPTA source selection process shall only be used when—
 - Minimum requirements can be described clearly and comprehensively and expressed in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;
 - No, or minimal, value will be realized from a proposal that exceeds the minimum technical or performance requirements;
 - The proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal;
 - The source selection authority has a high degree of confidence that reviewing the technical proposals of all offerors would not result in the identification of characteristics that could provide value or benefit;
 - No, or minimal, additional innovation or future technological advantage will be realized by using a different source selection process;

- o Goods to be procured are predominantly expendable in nature, are nontechnical, or have a short life expectancy or short shelf life;
- o The contract file contains a determination that the lowest price reflects full life-cycle costs of the product(s) or service(s) being acquired; and
- o The contracting officer documents the contract file describing the circumstances justifying the use of the lowest price technically acceptable source selection process.

Section 813, as amended, further provides that use of the LPTA process should be avoided, to the maximum extent practicable, when acquiring information technology, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, other knowledge-based professional services, personal protective equipment, or certain services in support of contingency or other operations outside the United States.

- Section 814 of the NDAA for FY 2017 prohibits the use of reverse auctions or the LPTA source selection process when purchasing personal protective equipment, if the level of quality or failure of the item could result in combat casualties. Section 882 of the NDAA for FY 2018 amends section 814 to further prohibit the use of reverse auctions

or the LPTA source selection process for aviation critical safety items as defined in 10 U.S.C. 2319(g).

- Section 832 of the NDAA for FY 2018 prohibits the use of the LPTA source selection process for engineering and manufacturing development (EMD) of a major defense acquisition program (MDAP) for which budgetary authority is requested beginning in FY 2019.
- Section 892 of the NDAA for FY 2017, as amended by section 1002 of the NDAA for FY 2018, amended 10 U.S.C. 254b to prohibit the use of the LPTA source selection process when acquiring auditing services and requires selection of service providers based on the best value to the Department, as determined by the resource sponsor for an auditing contract.

II. Discussion and Analysis

Use of the LPTA source selection process is implemented in Federal Acquisition Regulation (FAR) section 15.101-2. To supplement the FAR, DoD is proposing to add a new DFARS section 215.101-2-70 that addresses the various limitations and prohibitions on the use of the LPTA source selection process. This new section is broken into two paragraphs: paragraph (a) addresses the limitations provided in section 813 of the NDAA for FY 2017, as amended by section 822 of the NDAA for FY 2018; paragraph (b) addresses the prohibitions provided in sections 814,

832, and 892 of the NDAA for FY 2017, as amended by sections 882 and 1002 of the NDAA for FY 2018.

Currently, reverse auctions are not addressed in the FAR or DFARS. To implement the specific restriction on the use of reverse auctions to procure personal protective equipment and aviation critical safety items, DoD is proposing to add a new subpart 217.7X under DFARS part 217, Special Contracting Methods, to address the prohibition associated with reverse auctions under a section titled "Prohibitions."

The new statutory limitations and prohibitions on the use of the LPTA source selection process and reverse auctions apply to not only acquisitions conducted using FAR part 15 procedures for negotiation, but also—

- Orders placed against Federal Supply Schedules using FAR subpart 8.4 procedures;
- Acquisitions for commercial items using FAR part 12 procedures;
- Acquisitions conducted using FAR part 13 simplified acquisition procedures; and
- Orders placed under multiple award indefinite delivery contracts using FAR 16.505 procedures for fair opportunity.

In order to notify contracting officers of the new limitations and prohibitions when using these other procedures, DoD is

proposing to add cross-references to the new limitations and prohibitions outlined at DFARS 215.101-2-70 in DFARS sections 208.405, 212.203, 213.106-1, and 216.505. The new cross-references make clear that the limitations and prohibitions on the use of LPTA at DFARS 215.101-2-70 apply to the type of procurement being conducted. In addition, separate cross-references are added in these sections to highlight the restriction on the use of reverse auctions for the procurement of personal protective equipment and aviation critical safety items at 217.7XXX.

The new list of prohibitions at DFARS 215.101-2-70(b) includes the prohibitions on use of the LPTA source selection process for EMD of certain MDAPs and for audit services. Special requirements associated with the major system acquisitions are addressed in FAR part 234 and special requirements for the acquisition of audit services are addressed at DFARS 237.270. As such, DoD is proposing to add cross-references at DFARS 234.005-2 and 237.270 to the prohibitions associated with these types of procurement at DFARS 215.101-2-70(b).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not propose to create any new provisions or clauses or impact any existing provisions or clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This proposed rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The rule primarily affects internal Government requirements determination and acquisition strategy decisions, and contract file documentation requirements. However, an initial regulatory

flexibility analysis has been performed and is summarized as follows:

The rule proposes to revise the Defense Federal Acquisition Regulation Supplement (DFARS) to establish a preference for the use of the tradeoff source selection process for certain safety items and auditing services; prohibit the use of reverse auctions or the lowest priced technically acceptable (LPTA) source selection process for specific supplies and services; and specify criteria for use of the LPTA source selection process. The legal basis for the rule is the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328) and the NDAA for FY 2018 (Pub. L. 115-91).

DoD does not have access to information on the total number of solicitations issued on an annual basis that did or did not specify the use of the lowest price technically acceptable source selection process. However, the Federal Procurement Data System (FPDS) provides the following information for fiscal year 2016:

- DoD competitive contracts using FAR part 15 procedures. DoD awarded 18,361 new contracts and orders using negotiated competitive procedures, of which 47% were awarded to 5,221 unique small businesses. It is important to note that FPDS does not collect data for solicitations using the LPTA source selection process; therefore, this data applies to solicitations using both tradeoff and LPTA source selection

procedures, which will be subject to future considerations and restrictions provided by section 813 of the NDAA for FY 2017 and section 822 of the NDAA for FY 2018.

- Personal protective equipment. Based on information from FPDS for FY 2016, DoD issued 9,130 new competitive contract actions (including task, delivery, and call orders) potentially for combat-related personal protective equipment (PPE) items that could be impacted by restrictions in section 814 of the NDAA for FY 2017. Of those new contract actions, 89% were awarded to 668 unique small businesses.
- Aviation critical safety items. As discussed during the rulemaking process for DFARS 252.209-7010 published in the *Federal Register* at 76 FR 14641 on March 17, 2011, the identification of aviation critical safety items occurs entirely outside the procurement process and is not captured in FPDS. Therefore, it is not possible to assess the impact on small businesses.
- Audit-related services. DoD issued 46 new competitive contract actions (including task, delivery, and call orders) for audit services which may be impacted by section 1002 of the NDAA for FY 2018. Of those new contract actions, 61% were awarded to 17 unique small businesses. The average

award (including all options) to small business was valued over the simplified acquisition threshold.

- Major defense acquisition programs (MDAPs). The impact to small businesses resulting from implementation of sections 832 and 882 of the NDAA for FY 2018 cannot be assessed, since FPDS does not collect data for major defense acquisition programs (MDAPs) or for specific acquisition phases (i.e., engineering and manufacturing development (EMD)). Subject matter experts within DoD know of no instances where the LPTA source selection process has been used for procurement of EMD of an MDAP.

The proposed rule does not impose any Paperwork Reduction Act reporting or recordkeeping requirements on any small entities. The rule may impact some small businesses as offerors may need to change the way their quotations or offers are structured to conform to proposal instructions and corresponding evaluation criteria when responding to solicitations that use the tradeoff source selection process for supplies or services where the LPTA source selection process is now prohibited or must now be avoided. This incremental impact, which represents the incremental difference between a noncomplex LPTA proposal and additional information required for a tradeoff proposal, is expected to be minimal.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known, significant, alternative approaches to the proposed rule that would meet the requirements of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018-D010), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 208, 212, 213, 215, 216, 217, 234, and 237

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 208, 212, 213, 215, 216, 217, 234, and 237 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 208, 212, 213, 215, 216, 217, 234, and 237 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 208—REQUIRED SOURCES OF SUPPLIES OR SERVICES

2. Amend section 208.405 by redesignating the text as paragraph (1) and adding paragraphs (2) and (3) to read as follows:

208.405 Ordering procedures for Federal Supply Schedules.

* * * * *

(2) See 215.101-2-70 for the limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to orders placed under Federal Supply Schedules.

(3) See 217.7XXX for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

3. Add section 212.203 to read as follows:

212.203 Procedures for solicitation, evaluation, and award.

(1) See 215.101-2-70 for the limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to the acquisition of commercial items.

(2) See 217.7XXX for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

4. Revise section 213.106-1 to read as follows:

213.106-1 Soliciting competition.

(a) *Considerations.* (2)(i) Include an evaluation factor regarding supply chain risk (see subpart 239.73) when acquiring information technology, whether as a service or as a supply, that is a covered system, is a part of a covered system, or is in support of a covered system, as defined in 239.7301.

(ii) See 215.101-2-70 for limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to simplified acquisitions.

(iii) See 217.7XXX for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

PART 215—CONTRACTING BY NEGOTIATION

5. Add section 215.101-2 heading to read as follows:

215.101-2 Lowest price technically acceptable source selection process.

6. Add section 215.101-2-70 to read as follows:

215.101-2-70 Limitations and prohibitions.

The following limitations and prohibitions apply when considering the use of the lowest price technically acceptable source selection procedures.

(a) *Limitations.* (1) In accordance with section 813 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328) as amended by section 822 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91) (see 10 U.S.C. 2305 note), the lowest price technically acceptable source selection process shall only be used when—

(i) Minimum requirements can be described clearly and comprehensively and expressed in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;

(ii) No, or minimal, value will be realized from a proposal that exceeds the minimum technical or performance requirements;

(iii) The proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal;

(iv) The source selection authority has a high degree of confidence that reviewing the technical proposals of all offerors would not result in the identification of characteristics that could provide value or benefit;

(v) No, or minimal, additional innovation or future technological advantage will be realized by using a different source selection process;

(vi) Goods to be procured are predominantly expendable in nature, are nontechnical, or have a short life expectancy or short shelf life;

(vii) The contract file contains a determination that the lowest price reflects full life-cycle costs (as defined at FAR 7.101) of the product(s) or service(s) being acquired; and

(viii) The contracting officer documents the contract file describing the circumstances justifying the use of the lowest price technically acceptable source selection process.

(2) In accordance with section 813 of the National Defense Authorization Act for Fiscal Year 2017, as amended by section 822 of the National Defense Authorization Act for Fiscal Year 2018 (see 10 U.S.C. 2305 note), contracting officers shall avoid, to the maximum extent practicable, using the lowest price technically acceptable source selection process in the case of a procurement that is predominately for the acquisition of—

(i) Information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, or other knowledge-based professional services;

(ii) Items designated by the requiring activity as personal protective equipment (except see paragraph (b)(1) of this section); or

(iii) Services designated by the requiring activity as knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

(b) *Prohibitions.* (1) In accordance with section 814 of the National Defense Authorization Act for Fiscal Year 2017 as amended by section 882 of the National Defense Authorization Act for Fiscal Year 2018 (see 10 U.S.C. 2302 note), contracting officers shall not use the lowest price technically acceptable source selection process to procure items designated by the requiring activity as personal protective equipment or an aviation critical safety item, when the requiring activity advises the contracting officer that the level of quality or failure of the equipment or item could result in combat casualties. See 252.209-7010 for the definition and identification of critical safety items.

(2) In accordance with section 832 of the National Defense Authorization Act for Fiscal Year 2018 (see 10 U.S.C. 2442 note), contracting officers shall not use the lowest price technically acceptable source selection process to acquire engineering and manufacturing development for a major defense acquisition program

for which budgetary authority is requested beginning in fiscal year 2019.

(3) Contracting officers shall make award decisions based on best value factors and criteria, as determined by the resource sponsor (in accordance with agency procedures), for an auditing contract. The use of the lowest price technically acceptable source selection process is prohibited (10 U.S.C. 254b).

PART 216—TYPES OF CONTRACTS

7. Amend section 216.505 by—

- a. Adding new paragraph (a) heading;
- b. Redesignating paragraph (1) as paragraph (a) (S-70);
- c. Redesignating paragraph (2) as paragraph (a) (6);
- d. Adding new paragraph (b) heading; and
- e. Adding new paragraph (b) (1).

The additions read as follows:

216.505 Ordering.

(a) *General.*

* * * * *

(b) *Orders under multiple-award contracts—(1) Fair opportunity.* (A) See 215.101-2-70 for the limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to orders placed against multiple award indefinite delivery contracts.

(B) See 217.7XXX for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

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PART 217—SPECIAL CONTRACTING METHODS

8. Add new subpart 217.7X, to read as follows:

217.7X—REVERSE AUCTIONS

Sec.

7XXX Prohibition.

217.7X—REVERSE AUCTIONS

217.7XXX Prohibition.

In accordance with section 814 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328) as amended by section 882 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91) (see 10 U.S.C. 2302 note), contracting officers shall not use reverse auctions when procuring items designated by the requiring activity as personal protective equipment or an aviation critical safety item, when the requiring activity advises the contracting officer that the level of quality or failure of the equipment or item could result in combat casualties. See 252.209-7010 for the definition and identification of critical safety items.

PART 234—MAJOR SYSTEM ACQUISITION

9. Add section 234.005-2 to read as follows:

234.005-2 Mission-oriented solicitation.

See 215.101-2-70(b)(2) for the prohibition on the use of the lowest price technically acceptable source selection process for engineering and manufacturing development of a major defense acquisition program for which budgetary authority is requested beginning in fiscal year 2019.

PART 237—SERVICE CONTRACTING

10. Amend section 237.270 by—

- a. Redesignating paragraph (a)(2) as paragraph (a)(3); and
- b. Adding new paragraph (a)(2) to read as follows:

237.270 Acquisition of audit services.

(a) * * *

(2) See 215.101-2-70(b)(3) for the prohibition on the use of the lowest price technically acceptable source selection process when acquiring audit services.

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